Supreme Court, U.S.
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No. 99-60

In The

Supreme Court of the United States

RAINEY BROTHERS CONSTRUCTION COMPANY, INC.,

Petitioner,

vs.

MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMENT; AND CITY OF MEMPHIS, TENNESSEE,

Respondent's.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the doctrine of *res judicata* bar a claim for relief under 42 U.S.C. § 1983 in federal court when the case has "ripened" in state court pursuant to this Court's decision in *Williamson County Reg. Plan. Comm'n v. Hamilton Bank?*

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Defenders of Property Rights is the only national legal defense foundation devoted exclusively to protecting private property rights. Defender's was founded in 1991 as a non-profit, public interest law foundation whose members are property owners, users, and beneficiaries of the rights protected by traditional Anglo-American property law. Incorporated under the laws of the District of Columbia, Defenders of Property Rights participates in legal actions affecting the public interest and private property rights. Defenders of Property Rights engages in litigation across the country on behalf of its membership to stem government incursion forbidden by the Fifth Amendment.

Defenders has devoted a significant portion of its resources to the litigation of these issues to ensure that property rights, the cornerstone of any democracy, are preserved. Defenders of Property Rights has participated in every significant property

[1] Counsel for either party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

rights case before this Court since its founding including *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624 (1999), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

STATEMENT OF THE CASE

Amicus curiae herein adopts Petitioner Rainey Brothers Construction, Co., Inc., statement of the case. (*See* Pet'r Pet. for Cert. at 3-7.)

SUMMARY OF ARGUMENT

This case affords this Court an opportunity to provide badly needed guidance as to whether the requirement that a plaintiff first seek review of his taking claim in state court before filing in federal court—as set forth in *Williamson County Reg. Plan. Comm'n. v. Hamilton Bank*, 473 U.S. 172 (1985)—requires modification in light of more recent decisions by this Court.

Williamson County places two ripeness hurdles in the way of a taking claim brought in federal court against states and their political subdivisions. The first requirement of *Williamson*

County, that a claimant exhaust state administrative remedies before filing an action in federal court, was satisfied in this case. The second, and independent, requirement of *Williamson County* dictates that plaintiffs "seek compensation through the [judicial] procedures the State has provided for doing so" before turning to the federal courts. *Id.* at 194. Neither *Williamson County* nor have subsequent takings decisions by this Court treated *Williamson County* as mandating a jurisdictional requirement.

Had the court below treated the second prong of *Williamson County* as a prudential matter, it would have been required to defer to the trial court's factual determination that the case was sufficiently concrete for adjudication by the court, especially now that the case has been fully tried on previous occasions and reviewed on appeal. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (ripeness treated as a prudential rather than a jurisdictional issue.) Moreover, the court below ignored the fact that Petitioners originally filed this lawsuit in state court, and were prevented from pursuing the case when Respondent removed the action to federal court in October of 1989 on the ground that the action to federal question arising under the Fifth

Amendment to the United States Constitution and thus did not belong in state court. Likewise, at the time the lawsuit was filed, the State of Florida recognized no cause of action for inverse condemnation, rendering his state action futile as well as impossible.

By failing to understand *Williamson County* in light of later decisions of this Court, the court below has joined many federal courts across the nation which continues to apply *Williamson County* as if takings jurisprudence had not developed beyond the state of law in 1985. As discussed below, the holding in *Williamson County* has been interpreted inconsistently by federal courts as a jurisdictional, prudential and even a procedural requirement. Much of the inconsistency and confusion arises from the uncertainty at the time of *Williamson County* decision surrounding the fundamental nature of a just compensation case. This Court has addressed many of these questions since 1985. Indeed, while it may now be fairly said that the *Williamson County* decision is inconsistent with this Court's subsequent holdings in important respects, some lower courts continue to apply *Williamson County* as if subsequent decisions had not

answered many of the open questions. Thus, the time has come for this Court to reexamine *Williamson County* in light of subsequent holdings of this Court, including *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), all of which have fleshed out the elements of a Fifth Amendment cause of action.

As this Court has held on numerous occasions, the obligation for just compensation attaches whenever government action works a taking of private property rights. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This constitutional obligation is so evident that this Court has held that an aggrieved property owner need not look to a statute or other legislative authorization in order to obtain the remedy of just compensation to which he is entitled. *First English*, 482 U.S. 304 (1987); *United States v. Clarke*, 445 U.S. 253, 257 (1980).

In short, subsequent decisions of this Court have determined that the Fifth Amendment cause of action arises at the time the administrative decision becomes final as a matter of fact.

Nothing in those decisions suggest that the cause of action is incomplete until after the plaintiff had litigated his case in state court, nor do they stand for the proposition that a plaintiff whose state court case is removed to federal court is thereby defeated because the federal court lacks jurisdiction. Although *Williamson County* may have been a good guess at what was to come in Fifth Amendment jurisprudence in 1985, subsequent decisions of this Court require that *Williamson County* be revisited in light of current Fifth Amendment jurisprudence. Accordingly, Amicus Curiae urges this Court to grant this Petition for review and declare that their case has satisfied the prudential concerns of the state exhaustion ripeness requirement set forth by this Court in *Williamson County*, or, alternatively, to reverse summarily the opinion below as inconsistent with this Court's subsequent holdings in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987)*, and *Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)*.

Reason For Granting the Petition

An oddly perverse result occurs, which this case well illustrates, when the *Williamson County* ripeness doctrine combines with *res judicata* principles, barring a plaintiff from "relitigating" the takings claim which they filed in state court in obedience to the second ripeness hurdle. Under this "catch-22", a plaintiff must first file in state court (Williamson County) and, having litigated his claim to judgment, will be dismissed from federal court precisely because he did so. Thus, a plaintiff may be barred from bringing his constitutional claim to federal court—either because he has not yet litigated it in state court first, or because he has done so. *See generally* Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers, in* Institute on Planning, Zoning, and Eminent Domain § 7 (Matthew Bender 1991) and Douglas W. Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 Zoning & Planning Law Report 57 (1990). For example, in *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993), a property owner filed suit in state court

to challenge a mobile home rent control ordinance as an unconstitutional taking. He lost. The plaintiffs then filed in federal court, where the case was dismissed on the grounds of *res judicata*:

> Palomar's first argument that its takings claim cannot be barred because it was not ripe until the state court ruled on its claim, lacks merit. Palomar correctly interprets *Williamson County*, to require that a plaintiff take its takings claim to start court before the case will be ripe for federal adjudication. However, this requirement does not prevent the doctrine of *res judicata* from barring subsequent federal action..."Appellants have exhausted their state claims, which, under *Williamson*, is a necessary predicate to their federal cause of action; but in doing so, they received a full and fair adjudication of their constitutional claims against the City in state court. Due process guarantees them no less, but entitles them no more."...We are compelled to conclude that *res judicata* bars Palomar's claims in federal court, despite the requirements of *Williamson*.

Id. at 364-365 (citations omitted), *quoting Peduto v. City of North Wildwood*, 878 F.2d 725, 729 (3d. Cir. 1989) (subsequent federal claim for just compensation was also barred by the doctrine of *res judicata*). *Accord Mission Oakes Mobile Home Park v. City of Hollister*, 989 F.2d 359 (9th Cir. 1993).

In *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992) the neighbors of the Tampa Airport sought compensation in state court for the taking of noise and aviation

easements over their properties. They restricted their state lawsuit to Florida law, and raised no claims under the federal constitution. Having lost their suit at the state level, they filed their lawsuit in federal court, raising their federal claims. The case was dismissed as being barred by *res judicata* and collateral estoppel. The *Fields* court correctly framed the issue which must be resolved by this Court:

> This case presents a jurisdictional problem created by the interplay between 28 U.S.C.A. § 1738 and the Supreme Court's holding in *Williamson County*. On the one hand, *Williamson County* requires potential federal court plaintiffs to pursue any available state court remedies that might lead to just compensation before bringing suit in federal court under section 1983 for claims arising under the Fourteenth and Fifth Amendments for the taking of property without just compensation. On the other hand, if a litigant brings a takings claim under the relevant state procedure, he runs the risk of being barred from returning to federal court; most state courts recognize *res judicata* and collateral estoppel doctrines that would require a state court litigant to raise his federal law claims with the state claims, on pain of merger and bar of such federal claims in any attempted future proceeding.

Id. at 1302-03 (citations omitted). *Cf. New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488 (11th Cir. 1993) (case was not time-barred because it was premature to file in federal court until state litigation was complete).

Thus, a broad application of the second prong of the *Williamson County* ripeness requirement is not only a time-wasting hurdle for the courts and litigants, but may, in fact, bar altogether federal court adjudication of their Fifth Amendment claim for just compensation. While *Williamson County* may have been originally intended to require the litigation of state issues in state court, leaving the federal forum available in those instances where the state failed to provide compensation for a violation of the takings clause, the ripeness requirement was never intended to bar altogether Fifth Amendment litigants from federal court. Indeed, it would be anomalous to suggest that a right guaranteed by the United States Constitution could not be litigated in federal court. *See Jacobs v. United States*, 290 U.S. 13 (1933) (inverse condemnation suit rests on the Fifth Amendment and is therefore based on the Constitution).

In order to avoid such a result, some circuits have interpreted *Williamson County* narrowly, holding that it only applies in claims for just compensation. *See, e.g., Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991) (aggrieved landowner asserted deprivation of procedural due

process so his action was ripe even though he did not exhaust administrative remedies).

Granting *certiorari* in this case would help to provide guidance and uniformity of lower court decisions on a crucial constitutional question. The views of the lower appellate courts are often contradictory in nature resulting in constitutional justice being applied unevenly depending on geographical presence. The Third, Sixth, Ninth and Tenth Circuits have been the most strict in applying the doctrine of *res judicata* to prevent litigants from trying to exercise their rights under the Fifth Amendment and 42 U.S.C. §1983. [*See, E.g., Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 (10th Cir. 1998); *Palomar Mobilehome Park Assn. v. City of San Marcos*, 989 F.2d 362, 264-265 (9th Cir. 1993); *Peduto v. City of North Wildwood*, 878 F.2d 725, 726-728 (3d Cir. 1989)].

The Fourth and Eleventh Circuits avoid *res judicata* by allowing property owners to file initially in federal court while filing a "reservation" in state court. This "reservation" allows the state court to hear issues of state law while reserving federal constitutional issues to be decided later by a federal trial. [*See*

Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299 (11th Cir. 1992); *Front Royal & Warren County Indus. Park Corp.* v. *Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998); *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir. 1976)].

The Ninth Circuit, in particular, has vacillated about which approach to take. It hinted at accepting the approach of the Fourth and Eleventh Circuits in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) (*Dodd I*). However, in *Dodd II* it went back to its old approach of treating *Williamson County* as being a basis for *res judicata*. *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) (Dodd II).

It is clear that the lower courts need guidance in this area. Arguing simply from an efficiency standpoint neither system works well. The Ninth Circuit approach will have certiorari petitions to this Court increase dramatically if it is the only avenue of appeal from a state court decision in property rights cases. The Fourth and Eleventh Circuits tie up two court systems for the sake of balancing constitutional rights with the requirements of *Williamson County* and the traditional notions of judicial restraint.

From a constitutional point of view, "(t)he Supreme Court could hardly have intended the ripeness rules to become a trap for federal litigants." Mandelker, Gerard, & Sullivan, *Federal Land Use Law* §4A.02(6) at p. 4A-21 (Clark, Boardman, Callaghan 1998).

The role of the court as the final interpreter of the Constitution and the grant of federal courts to have original jurisdiction under 28 U.S.C. § 1332 for federal questions is severely undermined if *res judicata* is allowed to prevent property owners from receiving just compensation for governmental takings.

A review of the use of *Williamson County* ripeness bar utilized by lower courts severally undercuts the notion of the federal courts as being the protector of federal constitutional rights. The result on property owners is an unsure future. Between 1990 and 1997 federal courts used the *Williamson County* ripeness doctrine to refuse to review over 90 percent of all cases that dealt with land-use taking issues. Alex F. Annett, The Heritage Foundation, *How Congress Can End the "Regulatory Limbo" Blocking Property Owners' Access to*

Justice, FYI No. 154 October 1, 1997. *See also* Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Court's Will Go to Avoid Adjudicating Land Use Cases* 10 J.Land Use and Envt'l L. 91, 92 (for cases showing the lengths some federal courts will go to avoid hearing property rights cases).

The effect on landowners is painfully obvious. They are the only class of individuals in a Section 1983 that are singled out "ripen" their case in this manner. However, as this case demonstrates, if the state has a procedure to address the taking then they are barred by *res judicata* from litigating in federal court even if the state court has found that a taking has occurred but has failed to order just compensation. Property rights are the only area where states and localities are allowed to ignore the constitutional requirement that a taking requires just compensation. Until this Court reviews its decision in *Williamson County* and clarifies how it is affected by *res judicata,* this unconscionable situation will continue to the detriment of private property rights.

CONCLUSION

For the forgoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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